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IN THE SUPREME COURT OF THE UNITED STATES

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No. 99-1792

DIRECTOR OF REVENUE, STATE OF MISSOURI,
Petitioner,

v.

COBANK ACB, AS SUCCESSOR TO THE NATIONAL BANK FOR COOPERATIVES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF AMICUS CURIAE OF OHIO, FLORIDA, ILLINOIS, LOUISIANA, MARYLAND, MONTANA, NEBRASKA, NEW YORK, NORTH DAKOTA, SOUTH DAKOTA, AND VERMONT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF AMICUS INTEREST AND SUMMARY OF ARGUMENT

Ohio and ten other states support the Missouri Director of Revenue's petition for certiorari and urge the Court to reverse the decision of the Missouri Supreme Court. At issue is the scope of immunity from State and local taxation enjoyed by a certain federally chartered lending institution within the Farm Credit System, the National Bank for Cooperatives ("NBC"). (A reorganization occurred *after* the tax years at issue which merged the NBC into what is

now CoBank, ACB, another specially chartered Farm Credit System entity. That merger involved "unlike" entities with differing levels of statutorily prescribed tax immunity. During the tax years at issue, however, the institution's immunity status must be determined as a "bank for cooperatives.") The case presents the question whether the NBC, as a "federal instrumentality," should be granted intergovernmental tax immunities beyond those immunities which Congress expressly provided by statute. Stated more formally, the question is: Whether the Farm Credit Act of 1971, as amended, permits courts to apply the judicial doctrine of intergovernmental tax immunity from *McCulloch v. Maryland* to confer state income-tax immunity on a bank chartered under the Act, where the Act itself explicitly confers a more limited immunity that by its plain terms does not encompass immunity from state income taxes.

The question is not new to this Court, though it comes in new packaging. In this case, the Farm Credit System lender that claims immunity is the NBC; last time, it was a different Farm Credit System entity, the production credit association ("PCA"). At the urging of the States and the Solicitor General, the Court in 1997 granted certiorari over the question of intergovernmental tax immunity of PCAs, while simultaneously granting certiorari over a threshold jurisdictional question. *Arkansas v. Farm Credit Services of Central Arkansas*, 519 U.S. 1085 (1997) (granting certiorari); *see also same case* 520 U.S. 821, 824-25 (opinion of the Court per Kennedy, J.) (discussing posture of the case and noting that "[e]ntitlement to the immunity is the underlying substantive issue, were we to reach it"). (The Missouri Supreme Court decision in this case addresses immunity of PCAs as well as the NBC, and came to the same conclusion that Arkansas challenged in 1997 before this Court; but on account of a prior arrangement between the Director and the PCAs only the NBC aspect of the case is the subject of the petition for certiorari here.)

It is crucial to note that, although the NBC in this case is certainly a different institution from the PCAs in the prior case, the statutory provision addressing the tax immunities of the "banks for cooperatives" is, in history and language, verbatim the same statutory provision that addresses the tax immunities of PCAs. In fact, in the 1933 legislation that first provided for the chartering of both PCAs and banks for cooperatives, both institutions were treated as part of the very same immunity statute. Farm Credit Act of 1933, ch. 98, §63, 48 Stat. 257, 267 (1933).

In the Farm Credit Act of 1971, which amalgamated and re-codified previously distinct pieces of Farm Credit System legislation, the joint immunity provision was divided in parts, so that the portion of the 1971 Act devoted to PCAs contained its own tax immunity provision; and the portion of the 1971 Act devoted to banks for cooperatives contained its own tax immunity provision. Farm Credit Act of 1971, Pub. L. 92-181, §§2.17, 3.13, 85 Stat. 583, 602, 608 (1971). But the provisions, though divided, continued to contain (apart from the name of the institution) verbatim the same language. Then, in 1985, both tax immunity provisions were amended by deletion of the very same passages – in each case the last two sentences – so that (apart of course from the name of the institution) the two immunity provisions contained the same language verbatim both before and after the 1985 amendment. Farm Credit Amendments Act of 1985, Pub. L. 99-205, §§205(e)(16), (e)(10), 99 Stat. 1678, 1705 (1985). Finally, in the Agricultural Credit Act of 1987, which enacted comprehensive amendments to the Farm Credit Act of 1971, certain technical amendments added the language "except that interest on such obligations shall be subject to Federal income taxation in the hands of the holder" at the end of both the PCA and the banks for cooperatives immunity statutes. Agricultural Credit Act of 1987, Pub. L. No. 100-233, §805(j) and (p), 101 Stat. 1568, 1715-16 (1988).

Thus, the immunity question in this case is the same immunity question as that presented by the PCAs. It poses the same situation of a lower court applying broad immunity under a judicially-created immunity doctrine despite express statutory language describing what immunities should be recognized.

Ultimately, the Court in the 1997 Arkansas PCA case held the Tax Injunction Act had barred the district court from hearing the case, and for that reason the Court did not reach the merits of whether the lower court had properly granted additional immunities to the PCAs. 520 U.S. 821, 832. Now the immunity question, which the Court in 1997 found worthy of review but did not reach, is presented in the context of the same statutory language, and it comes from the Missouri Supreme Court unencumbered by jurisdictional difficulties. For the same reasons as before, the Court should grant certiorari here.

REASONS FOR GRANTING THE WRIT

A. The Court Has Already Determined That, As To Production Credit Associations ("PCAs"), The Immunity Issue Presented Here Is Worthy of Review. Inasmuch As The 'Banks for Cooperatives' Immunity Statute Is Identical To The PCA Immunity Statute, The Same Reasons For Granting Certiorari Apply Here, And Those Reasons Have Not Diminished Since 1997 But Rather Increased.

Congress proclaimed "banks for cooperatives," like PCAs, to be "federal instrumentalities" and expressly immunized their "notes, debentures and other obligations" from federal, State and local taxation, 12 U.S.C. 2134, compare PCA immunity statute, 12 U.S.C. 2077. But in spite of Congress's enumerated grant of immunities, the Missouri Supreme Court held the NBC (and the PCAs as well) additionally enjoys immunity from State corporate income tax. The Missouri court predicated that result on the doctrine of *McCulloch v. Maryland*, 17 U.S. 316 (4 Wheat.) (1819). That result parallels what two judges of a three-judge panel of the Eighth Circuit held as to the PCAs in the 1997 Arkansas case, 76 F.3d 961 (1996). From the Eighth Circuit's decision, Arkansas petitioned for certiorari. It received support from Ohio and 12 other States.

In response to that petition, the Court sought the view of the Solicitor General, who complied by filing a brief that agreed with the States both that certiorari should be granted on this issue and that PCAs were not immune from state taxation. Accordingly, in addition to pointing out that the Tax Injunction Act had barred jurisdiction in the federal district court, the Solicitor General specifically asserted that the Eighth Circuit decision "construes the Farm Credit Act of 1971, 12 U.S.C. 2077, in a manner that calls into question

long-standing impositions of state taxes on production credit associations in which the federal government does not have an ownership interest." U.S. Brief (On Petition For Writ of Certiorari), No. 95-1918, at 7.[1]

Certiorari was then granted over the merits issues, 519 U.S. 1085 (1997), with the Court additionally requiring the parties to brief and argue the Tax Injunction Act question. Ultimately, the Court reversed on the grounds that the Tax Injunction Act barred federal jurisdiction, 520 U.S. 821, and thereby did not reach the substantive issue of tax immunity. Thereafter, the PCAs pursued their refund claims in Arkansas state courts. When the Arkansas Supreme Court eventually ruled in favor of the PCAs, *State v. Farm Credit Servs. Of Central-Arkansas*, 994 S.W.2d 453 (Ark. 1999), Arkansas again petitioned for certiorari, No. 99-993. Ohio and 14 other states supported the petition.

The Court denied certiorari on March 27, 2000, 120 S.Ct. 1530, but the docket in the case indicates some concern about the Arkansas revenue counsel's authority to file the petition in this Court without involvement by Arkansas's Attorney General. That concern, a state-law issue unique to that case, does not diminish the ongoing importance of the federal-law question of immunity of Farm Credit System entities. Indeed, the conflict among lower courts has deepened since Arkansas filed its latter petition: the New Mexico appellate court properly concluded that PCA immunity is indeed limited to what the statute by its terms confers. *PCA of Eastern N.M. v. Taxation and Revenue Dep't*, No. 20,078, 2000 N.M. App. LEXIS 8 (Feb. 1, 2000), *review denied*, 997 P.2d 820 (N.M. March 13, 2000).

[1] Citations to the U.S. brief in Case No. 95-1918 are to the brief submitted at the petition stage. The Solicitor General also filed a brief on the merits in support of Arkansas's position.

Now presented in the proper posture of a state court decision, the tax immunity issue is ripe for review by this Court. The reasons for granting certiorari remain compelling.

- The Missouri Supreme Court opinion manifests the same error as the Eighth Circuit decision in 1996 and the Arkansas Supreme Court decision in 1999. As a result, the very same conflict arises between the Missouri Supreme Court's decision and the judgments of courts in other States as the Eighth Circuit's decision created in the prior case. Most recent is the conflict with the New Mexico appellate court's disposition of PCA immunity in *PCA of Eastern N.M. v. Taxation and Revenue Dep't*, No. 20,078, 2000 N.M. App. LEXIS 8 (Feb. 1, 2000), *review denied*, 997 P.2d 820 (N.M. March 13, 2000). *See also, Columbus PCA v. Bowers*, 180 N.E.2d 1 (Ohio 1962) (statutory language conditioning broad tax immunity on government ownership constituted express consent to state corporate franchise taxation once all shares were in private hands); *Woodland PCA v. Franchise Tax Board*, 37 Cal. Rptr. 231 (App. 1964) (PCA's franchise subject to state taxation once PCA shares were all privately owned despite congressional declaration that PCA franchise is "federal instrumentality"). *Accord Baker PCA v. State Tax Comm'n*, 421 P.2d 984, 987 (Ore. 1966) (PCA conceded that "PCAs became subject to state taxation

whenever the government ownership of the stock was terminated").[2]

- The monetary stakes for the States have only increased in the interim. In seven (7) responding states, a partial and cursory survey reveals currently pending refund or reassessment claims involving PCAs or other Farm Credit System entities amounting to no less than sixteen million (16,000,000) tax dollars at issue.

- No action by Congress in the interim has clarified or altered the issues.

- Beyond the impact on State and local finances, the issue retains additional importance arising from the distortion of the competitive lending market. Special, extra-statutory tax breaks for Farm Credit System players mean an uneven playing field among themselves and with respect to competitors in the agricultural lending sector. At the merits stage in the prior case, the brief of Amicus American Bankers' Association *et al.* highlighted this significant aspect of the issue.

- In its brief in opposition, respondent contrasts this "bank for cooperatives" case with PCA cases, asserting at page 7 that "because this case involves only the question of the proper construction of Section 2134, it impacts a small number of Farm Credit System entities" and at page 8 that no "broader statutory or constitutional questions" are presented. But the roll call of recent decisions at page 12 of respondent's brief refutes those assertions; it shows burgeoning litigation involving Farm Credit System entities throughout the Nation that cries out for this Court to clarify that the statutes completely define the scope of immunity.

Because the Missouri Supreme Court decision stands in conflict with other lower court decisions and presents the appropriate case to address an issue that retains its national importance, the Court should follow its prior decision to grant certiorari over the same immunity issue that was presented in the 1997 Arkansas PCA case.

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[2] These cases reflect what the Solicitor General in the 1997 Arkansas case justly called the "long-standing impositions of state taxes on production credit associations," but the erroneous reasoning of the Eighth Circuit in the last case and the Missouri Supreme Court in this case appears to be infectious: respondent at page 12 cites a number of decisions that have misconstrued the Court's precedents in the same way as did the Missouri court in this case. On the other hand, a New York State administrative tribunal recently reaffirmed that the business inherited from a PCA by a merged Farm Credit System entity is subject to the State's franchise tax. *In re Farm Credit of Western New York ACA*, Nos. 816576, 816604, 816605, 816606, 2000 N.Y. Tax LEXIS 7 (Jan. 13, 2000).

B. This Case Presents An Excellent Vehicle To Articulate The Overarching Principle That The Tax Immunity Of All Institutions Chartered Under The Farm Credit Act of 1971, As Amended, Turns Not On A Judicial Doctrine Of Inherent Intergovernmental Immunity, But Solely On The Extent To Which The Act Itself, Either By Expression Or By Implication, Confers Immunity. That Principle Will Become Applicable In A Large Number Of Tax Immunity Claims By Farm Credit System Entities.

The Missouri Supreme Court employed the same erroneous analysis that two of the Eighth Circuit judges adopted in the 1997 Arkansas case. Namely, the state court looked at Congress's designation of both PCAs and the NBC as "federal instrumentalities" at 12 U.S.C. 2071, 2141, and found that such status conferred broad tax immunity absent an express "waiver" by Congress. The state court adopted this theory in spite of the express grant of more limited immunity to the notes, obligations and debentures of PCAs and the NBC that immediately follows the instrumentality designation in both 12 U.S.C. 2071, 2077 (PCAs) and 12 U.S.C. 2141, 2134 (banks for cooperatives).

Just as troubling as the result itself is the absence in the Missouri Supreme Court's opinion of any explanation about, or attempted refutation of, the objections and concerns raised by the States, by the Solicitor General, and by the non-PCA bankers in the last case. Specifically, the Missouri Supreme Court failed to explain why the doctrine of *expressio unius* should not apply to limit tax immunities to those mentioned and explicitly conferred by Congress. Nor did the lower court offer any reason to disregard the unbroken legislative history that the reduction of tax immunities always accompanied the complete privatization of both PCAs and banks for cooperatives. Pet. at 8-11; U.S.

Brief (On Petition for Writ of Certiorari), No. 95-1918, at 2-4. In light of this Court's observations last time that "[t]he PCAs' business is making commercial loans," and that PCAs' "interests are not coterminous with those of the Government any more than most commercial interests," 520 U.S. at 831 – observations that could fairly be made of "banks for cooperatives" as well[3] – the state court ought to have explained why such factors should be disregarded in deciding the scope of intergovernmental tax immunity.

Perhaps most startling of all, however, is the apparent misappreciation the Missouri Supreme Court showed toward the statutory analysis this Court utilized in the 1997 Arkansas case. That analysis would, if applied to the tax immunity question, strongly militate to the contrary result to that reached below. In the prior case, this Court decided that the PCAs, "[d]espite their formal and undoubted designation as instrumentalities of the United States," did not "have or exercise power analogous to that of the NLRB or any of the departments or regulatory agencies of the United States." 520 U.S. at 831-32. That sufficed for the Court to "conclude that instrumentality status does not in and of itself entitle an entity to the same exemption the United States has under the Tax Injunction Act." *Id.* The course of the Court's analysis in this regard included explicit reference to tax immunities as well:

> The tax immunity a PCA has under §2077 is a permitted consequence of its status as a federal instrumentality. An instrumentality of the United States can enjoy the benefits and immunities conferred by explicit statutes, however, without the

[3] Although the NBC lent to cooperative associations rather than individual farmers, its own purposes and objectives do not substantively differ from those of PCAs.

> further inference that the instrumentality has all the rights and privileges of the National Government.

520 U.S. at 829.

Yet, in spite of the relevance of this analysis for applying to the tax immunity question principles similar to those governing jurisdiction under the Tax Injunction Act, the Missouri Supreme Court offered absolutely no explanation why this Court's statutory analysis would not apply to the immunity question also. As the most recent and direct statement (albeit dicta) touching on tax immunity of instrumentalities, closer attention was surely due to the *Farm Credit* decision.[4]

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[4] The Missouri Supreme Court mentioned this Court's 1997 *Farm Credit* decision only once, Pet. App. at A-3, where it was referenced only as subsequent history to the Eighth Circuit decision under the rubric "reversed on other grounds." There was no further discussion of *Farm Credit*'s having any relevance. The Missouri Supreme Court did cite *Farm Credit Services of Mid-America v. Dep't of State Revenue*, 705 N.E.2d 1089 (Ind. Tax Ct. 1999), a case where a state tax court declined to extend this Court's statutory analysis in *Farm Credit* to determining the tax immunity of a Farm Credit System entity (not a PCA), primarily on the grounds that it thought doing so would require overruling *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). 705 N.E.2d at 1093. But that is not so, as noted below; in *McCulloch* there was no immunity statute. The other state court cases, *State v. Farm Credit Services of Central Arkansas*, 994 S.W.2d 453 (Ark. 1999), cert. denied, 120 S.Ct. 1530 (Mar. 27, 2000); and *Northwest Louisiana PCA v. State*, 746 So.2d 280 (La. App. 1999) simply manifest the same error committed by the Missouri Supreme Court but engage in no analysis regarding the genuine significance of this Court's reasoning in the 1997 Arkansas case.

Nor does the state court's reliance on *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) adequately respond to the Court's reasoning in *Farm Credit*. That is so, because *McCulloch* involved bank legislation that made no mention of state tax immunity one way or the other. Thus, *McCulloch* does not teach us whether or not a statute that *does* address immunity permits judicial implication of further immunities beyond those legislatively conferred – and why Congress's explicit enumeration of tax immunities for "banks for cooperatives" at 12 U.S.C. 2134 should not be deemed exclusive.

The Missouri court cites to other decisions of this Court that are equally unconducive to its conclusion. **First**, *Department of Employment v. United States*, 385 U.S. 355 (1966), held only that certain Internal Revenue Code provisions that exempted "federal instrumentalities" from state unemployment taxes applied to the National Red Cross. The fact that *Department of Employment* applied a statutory immunity which Congress explicitly conferred upon certain "instrumentalities of the United States" is easily overlooked. The discussion of the statutes is consigned to the last paragraph of the opinion, which examines the effect of a 1960 amendment to those statutes. The Court concluded that service performed for certain "instrumentalities of the United States" was intended to be exempt from state as well as federal employment taxes; in accordance with this reading of the statutes the bulk of the opinion focuses on whether the Red Cross was such an "instrumentality" for purposes of applying the statutory exemption. Nothing in the holding of *Department of Employment* endorses judicial grants of immunity beyond what the statutes confer.

Second, *United States v. Mississippi Tax Comm'n*, 421 U.S. 599 (1975), involved the imposition of sales taxes on liquor sales to post exchanges, officers' clubs, ship's stores, and "other nonappropriated fund activities" on

military bases, 421 U.S. at 606, which without difficulty the Court understood to be a tax directly on the United States. That situation radically differs from the approach the Court endorsed in the 1997 Arkansas case to federally chartered but privately held lenders; where, as with the PCAs there and the banks for cooperatives here, the lender's "business is making commercial loans, and all their stock is owned by private entities," the interest of federally chartered institutions "are not coterminous with those of the Government any more than most commercial interests." 520 U.S. 821, 831. Accordingly, "[a]n instrumentality of the United States can enjoy the benefits and immunities conferred by explicit statutes [] without the further inference that the instrumentality has all of the rights and privileges of the National Government." 520 U.S. at 829.

Third, *First Agricultural Nat'l Bank v. State Tax Comm'n*, 392 U.S. 339 (1966), did not at all rely upon a general, judicially implied intergovernmental tax immunity that can only be waived by explicit provision of Congress, but instead placed exclusive reliance on the history of the passage and application of the tax immunity statute. In finding immunity, the Court declined to "change what legislative history and prior decisions have established is the precise meaning of an Act of Congress," and held that "[b]ecause of §548 and its legislative history, we are convinced that if a change is to be made in state taxation of national banks, it must come from the Congress..." 392 U.S. at 345, 346. That approach is consistent with the one favored by the States in this case, not that favored by the respondent and the Missouri court.

Fourth, *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954), similarly involved imposition of a sales tax on purchases made on behalf of the United States Government as part of naval procurement through independent contractors; despite the intervening hand of the contractors as

purchasing agents, the Government was the actual purchaser and the state could not tax it as such. Attempting to apply *Kern-Limerick* here is as inappropriate as attempting to apply *United States v. State Tax Comm'n* in light of the doctrine and dicta in the 1997 Arkansas case.

Fifth, *United States v. County of Allegheny*, 322 U.S. 174 (1944), involved imposition of an *ad valorem* property tax on equipment owned by the United States but operated at a private facility; no tax could be imposed on the United States' interest in the property. Federal, not state, law determined whether the United States "owned" the property under the arrangements with its contractor. That holding plainly says nothing about the liability of a federally chartered but privately held lender for state corporate income tax.

In no way can the Missouri Supreme Court be said to have advanced the analysis of tax immunity past the point of the Eighth Circuit panel majority in the 1997 Arkansas PCA case. That clarification needs to be supplied by this Court just as much now as in 1997, when certiorari was granted over the PCA immunity issue where the same statutory immunity language was implicated. This time, the question is fully ripe for disposition by this Court.

CONCLUSION

For all the foregoing reasons, the writ of certiorari should be granted and the decision of the Missouri Supreme Court should be reversed.

Respectfully submitted,

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